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INTERNATIONAL LAW AND POLITICAL SCIENCE

It is a truism that the science of law proper — the science dealing with the national law of each nation — is very different from the science of what is called international law. In the study of the law of the United States or the law of Great Britain, one finds the whole science based on the fact of the existence of a political society known as the United States or Great Britain, which formulates, applies and enforces the law which governs these nations in their internal relations. When one enters upon the study of what is called international law, one finds himself expected to accept as a fundamental proposition that there is no political society which formulates, applies and enforces the law which he is told governs all nations in their external relations, and that this *law* is formulated, applied and enforced *among* or *between* the nations. This difference in fundamentals leads to corresponding differences in the derivative notions. Practitioners of law proper take little or no interest in what is called international law. From their point of view, that which is called international law is only a collection of the rules of a highly interesting game, success in which depends largely upon “face” and personality; nor can it be denied that there is much to justify this opinion. Students of law reflect the attitude of mind of the practitioner, and the great majority of students end their legal education when they finish the courses in national domestic law, giving no consideration to the law which governs the actions and relations of the nations.

In recent years, the development of what is known as political science, which is the science dealing with the structure and working of political societies, has accentuated the difficulties of students who wish to gain some knowledge of the political and legal affairs of the world. They study the structure and working of the town, the county, the state, and the nation for the purpose of making these political societies more economical and efficient. They even go beyond the confines of the nation and study the structure and working of vast political organisms

like the British Empire for the same purpose. But when they seek to apply political science to the structure and working of the whole human society, they are confronted by a prevalent idea that beyond the limits of nations, or at least beyond the limits of political organisms like the British Empire, there is political chaos. They are taught that the nations are sovereign and independent, but that all the nations have the mutual attribute of solidarity. If the word solidarity is given its technical meaning, it seems not to imply a complete or a federal unity, but rather a mutual relationship of the persons or societies concerned under an implied contract of each with each, and with all, whereby all are the mutual guarantors of each other. In this technical sense, solidarity of the nations, seems, when analyzed, to imply a universal extension of the balance of power system, which for four centuries has drenched Europe with blood. If the nations are mutually guarantors of each other, it necessarily follows that if one nation becomes expansive or aggressive, "international solidarity" compels its surrounding neighbors to ally themselves so as to balance or overbalance the power of the aggressor nation, for the purpose of holding it in check. This is exactly the balance of power system. It leads to shifting alliances, *ententes* and *concerts*. The system in operation is essentially a military game, requiring the application of rules of strategy. It is the antithesis of political organization, and though it may ultimately lead to political organization through the exhaustion of the parties and their perception of the waste and inefficiency involved, it frequently involves a military dictatorship as an intermediate process.

But the march of events is modifying this technical meaning of solidarity, and the word is coming into popular use in a new and enlarged sense as implying an existing unity, federal in type, of the whole body of the peoples and nations of the world. This enlarged meaning of solidarity is apparently due to the effort of the public mind to find a word to express the altered views which people everywhere are beginning to have concerning human society as a whole. Educated and uneducated persons alike, familiarized by the public press with the doings of all the peoples and nations of the world through the processes of modern invention, now understand that the world is made up of political societies much resembling those to which they are accustomed. It is becoming

more and more impossible to induce the average man to believe that his nation is related to other nations after the manner of savages or half-civilized persons. It is becoming increasingly easy for him to realize that all the peoples, countries, states, nations and empires of the world are in fact, by the necessity of the case and by their own consent, united into one great political organism and society. It has become necessary to give this inclusive society a name, and the name of "the society of nations" is rapidly becoming attached to it—not because the name is scientific and strictly accurate, but because it is brief and expresses fairly well the idea intended.

The fact seems to be that in this last decade, there has occurred what may be termed in some sense a peaceful revolution and in some sense a renaissance. There has been during this period a change of thought away from the accepted philosophy and a taking up with a new philosophy of a higher type. For a political economy which regarded human happiness as based on production and distribution of commodities, and made credit—the inviolableness of contracts—the prime requisite, there is being everywhere established a political philosophy which is based on the moral worth and dignity of the individual, and insists that contracts and relationships inconsistent with this dignity are not of binding force. All contracts and relationships are subjected to this test of invalidity, and, as all social and political organization is in its last analysis only a system of individual contracts and relationships, all such organization is being subjected to the same test. Thus, all forms of social and political organization which are inconsistent with the moral worth and dignity of the individual are coming to be regarded as void, and governments are considered to be just, economical and efficient, not according as they protect the production and distribution of commodities, but according as they recognize, protect and preserve the moral worth and dignity of each and all individuals. Political organization is thus regarded as an inseparable incident of human life and as an attribute of the individual. In other words, we are changing to a philosophy which treats political organization and government as in part an attribute and in part a creation of man. Where two human beings exist together, contracts and relationships exist between them and they form a community, in spite of themselves, which is a political organization

and a government. Political organization and government are, in this new philosophy, regarded as necessities which the individual must have whether he will or not, just as he must breathe air or drink water. He may take government in a crude and harmful form, just as he may breathe bad air, or drink polluted water; but he cannot avoid being in contractual or actual relationship with other human beings and hence forming a political organization with them any more than he can avoid breathing or drinking. All he can do is to see to it that he gets pure government, pure air and pure water.

This new philosophy, as has been said, is gradually making its way, tempering the harshnesses of the old trade and credit economy. That philosophy had resulted in the sacrifice of human life and dignity to the production and distribution of goods, in the inviolability of contracts even though they called for the sacrifice of life and dignity, and in free competition whereby the strongest might overcome the others and establish any relationships with the vanquished even to the destruction of life and dignity. The new philosophy is altering the outlook of the individual upon all kinds of social, economic and political organization. Each individual recognizes all kinds of organization as a possible means of extending his own powers, though capable of being perverted so as to injure or destroy him. He is beginning to understand that organization exists and that all he can do is to change it; and as he seeks for a limit to the extension of organization, his mind refuses to stop short of the whole human society. As each human being is born a citizen of his city, a citizen of his state, or a citizen of his nation, so also, it is being realized, he is born a citizen of that great inclusive society composed of all the peoples and nations of the world. He may change his citizenship in the city, the state, or the nation; but his citizenship in this great inclusive society which, for want of a better name, we call "the society of nations" is permanent and unchangeable. He cannot escape this citizenship; he can only improve the organization so as to make it more consistent with the moral worth and dignity of himself and all other human beings. Nor can the whole body of the peoples of the world by any action prevent the society of nations from existing. They cannot even ignore it, for once it is recognized, it becomes the only permanent human institution, and an object of the solicitous care of the peoples and nations; for

through the society of nations, the nations as well as the individual realize the fullest extension of their powers.

It requires but a moment's reflection on the part of an intelligent person to perceive that if the common sense and judgment of the world accept the society of nations as a part of present day practical politics, it can be made a subject of study by political science exactly in the same way as a town, a city, a state, a nation or an empire. In this view, the law which governs the nations is the law which is imposed on the nations by the society of nations. The nations obey this law not because they wish to do so, or because they agree to do so, or because they regard it as a matter of honor to do so, but because the peoples and nations of the world recognize themselves as together forming a political society which is greater than any nation and which includes all nations, and have delegated to that society the function of formulating, applying and enforcing a constitution and law for the common and general purposes of all the nations. The constitution and law so formulated by this political society by virtue of its delegated power, bind the separate nations and their peoples in the same way that the constitution and law of the United States bind the States of the United States and their peoples. That which is called international law is thus seen to be the law of the society of nations, or, to use the briefer and more popular expression, the law of nations.

It is true, there are difficulties in the way of the acceptance of these modern notions. In the society of nations there is nothing to be found exactly resembling a constitutional convention, a legislature, an executive or a court, as we know these institutions in our national life. Nevertheless, in the society of nations one may distinguish and identify crude institutions of a constitution-making, legislative, executive and judicial character and may discover crude constitution-making, legislative, executive and judicial processes going on by which the constitution and law of the society of nations are gradually being formulated, and by which those constitutional and legislative provisions which have been formulated are being interpreted, applied and enforced.

When the society of nations is further studied according to the methods and principles of political science, it will be found that, although it is in the primitive stages of organization, it even now bears a general

resemblance to a federal state. The central government at the present time will be found to be deposited in commission, and the commission is of so indefinite and changeable a character as to be hardly recognizable. The Hague Conferences and the Hague Tribunals have tended to visualize the central government of the society of nations, but these institutions are, after all, but a fractional part of the institutions which even at the present moment constitute the central government. The indefiniteness concerning the location of the central government and concerning the nature and extent of its powers leads to a corresponding indefiniteness respecting the residual powers of the various nations. The nations, on account of these deficiencies in the central government, are obliged to act in a double capacity, and at times not only to perform their own domestic functions, but to exercise the functions of the central government. Thus, though the principles of federal government are to be taken as a general guide in studying the structure and working of the society of nations as a matter of political science, and in studying the law of the society, these principles are subject to many qualifications and variations, due to the present indefiniteness of the organization of that society.

For the purpose of showing how the acceptance of the society of nations as a fact of practical politics alters the fundamental principles of the law which governs the nations, it will be attempted to state these principles. Such a statement might be as follows:

1. The society of nations is a political society composed of all the peoples, countries, states, nations and empires of the world. It exists by its own recognition of its existence, having on human superior. It is permanently instituted by the necessity of the case and by the common consent of all the peoples, countries, states, nations and empires as their supreme organ for formulating, applying and enforcing their conscience and will as respects the general measures necessary for their common protection and welfare, and for the preservation of the component nations and political societies without change except as may be needful for the common good. The society of nations establishes and maintains such constitution-making, legislative, executive and judicial institutions and processes, as are considered by the people and nations of the society to be best adapted for these purposes respectively.

2. The law of the society of nations is the body of rules, duly formulated, applied and enforced by the society of nations through appropriate institutions and processes, regulating the actions and relations of the nations and their citizens. This law extends only to the common and general purposes of the nations and the whole society, and resembles the federal law in a federal state.

3. The law of the society of nations (like the law of all states, particularly the law of federal states) is divided into three grades — the organic (or constitutional) law, the statutory law, and the customary (or common) law. The organic law is superior to both the statutory and the customary law. The statutory law is superior to the customary law. The organic (or constitutional) law is composed of those principles which are so fundamental and permanent as to be indispensable to the structure and organic existence of the society. The statutory law is composed of those principles, consistent with, dependent upon and in support of the organic law, which are formulated and established by legislative institutions and methods. The customary (or common) law is composed of those principles, consistent with, dependent upon and in support of the organic and statutory law, which are formulated and declared by courts or judicial tribunals in cases arising before them, based on common and accepted custom of the peoples and nations of the society.

4. The present organization of the society of nations being indefinite, the ultimate constitution-making, legislative, executive and judicial power of the society is for the present vested in the nations, acting collectively or separately as the organs of the society. The highly civilized and well-armed nations take the lead in formulating, applying and enforcing the constitution and law of the society, partly by the general consent, and partly by the necessity of the case; but all the nations are at liberty to formulate, apply and enforce, individually or by agreement, such principles as they may consider it probable the society of nations would formulate, apply and enforce in the circumstances. The use of armed forces by separate nations to establish justice and maintain order, in execution of the constitution and law of the society of nations, is justifiable, and is not to be regarded as war, but as constabulary action in the name of the executive power of the society of nations.

5. Nations, states, or countries, may form any sort of relations or make any contracts with each other which are not self-destructive as respects either party or destructive as respects third parties, and which are not opposed to the constitutional dispositions of jurisdiction accepted by the society of nations, or to the limitations imposed upon the nations by the constitution of the society. When a relationship is thus established, or a contract is thus made, the same principles apply in interpreting the relation or contract as are applied in interpreting similar relationships or contracts between individuals or corporations, or between the states of a federal union; but these principles are to be applied only by way of analogy.

6. All differences between nations with respect to which there exists a duly formulated and settled principle of the organic law of the society of nations and also a duly formulated statutory principle or an established custom consistent with such organic principles, or with respect to which the parties are able to agree upon principles which are to be regarded as principles of the law of the society of nations for the purposes of the case, if not settled by agreement, may be settled by arbitration or by the decision of a court of the society of nations. Where there are no such principles, and the parties are unable to agree upon such principles for the purposes of the case, other nations may mediate for the purpose of finding a way to settle the difference, or the matter may be postponed to await the formulation and establishment of the applicable principles by a conference of all the nations or of all the nations interested; and it is the duty of all nations to urge such postponement, and to co-operate for the formulation and establishment of such principles. When such postponement is impossible, armed force applied by one nation against another to compel it to recognize a principle of the law of the society of nations which approves itself to the common juridical conscience of the world, is justifiable.

7. Treaties between nations for the arbitration of disputes between them not capable of settlement by agreement, or for the submission of such disputes to judicial settlement, should exclude all cases which involve a principle of the organic law of the society of nations which has not been formulated and settled by the constitution-making action of the nations, since it is not the function of arbitral tribunals or courts to

formulate and settle the organic law of the society of nations. These principles can only be settled by the nations directly, either by joint agreement, or by the insistence of one or more nations backed by armed force if necessary, supported by the common juridical conscience of the world. In an arbitration or judicial settlement of disputes other than those last mentioned, under a general arbitration treaty, the tribunal or court is to apply the settled principles of the organic, the statutory, and the customary law of the society of nations in the order of superiority as above stated. In interpreting settled principles of the organic law of the society of nations, the tribunal or court is to be guided by analogy drawn from the principles of the constitutional law of states and nations, and particularly by analogy drawn from the federal constitutional law of federal states. In interpreting settled statutory rules of the law of the society of nations not inconsistent with the organic law, the tribunal or court is to be guided by analogy drawn from the rules of the law of states and nations relating to the interpretation of statutes, and particularly by analogy drawn from the rules relating to the interpretation of federal statutes in federal states. In declaring and interpreting the customary law of the society of nations not inconsistent with the organic and statutory law, the tribunal or court is to consider all treaties and all national statutes or judicial decisions involving principles applicable to the case, and is to be guided by analogy drawn from the statutory and customary law of states and nations, and particularly by analogy drawn from the federal statutory and common law in federal states. Such analogies are not to be pushed to the point where national rights of self-protection and self-preservation would be endangered by premature or excessive admixture of peoples in different stages of civilization or of divergent ideas or sentiments, or by unregulated economic competition; but all reasoning by analogy drawn from state or national action is to be subject to national rights of self-protection and self-preservation, since the existence of the nations is fundamental to the existence of the society of nations. When disputes arise between nations under treaties, the tribunal or court is to consider the treaties themselves as subject to the law of the society of nations. Treaties found by the court to be repugnant to the law of the society of nations are to be held contrary to public policy and void, to the extent that

they are so repugnant, and the case is to be decided according to the law of the society of nations.

8. The autonomy of all nations is inviolable except where the autonomy of a nation is opposed to the constitution and law of the society of nations and is inconsistent with the peace and welfare of the society. An entry by a nation into the territory of another in the name of the executive power of the society of nations, must be based on an intolerable condition of anarchy there prevailing or upon a breach of the law of the society of nations by the nation entered, of so serious a character as to render restraint or punishment of the nation necessary, in the interests of the society of nations; and the constabulary power thus applied must be only carried to the extent necessary to effect the necessary reorganization of the nation thus policed. If entry by armed force is made without due cause by one nation into the territory of another, the nation entered has the right to use its armed force in self-defense; and the right of self-defense exists when, after lawful entry by a nation, it attempts the destruction or excessive punishment of the nation entered.

9. An entry by a nation into the territory of another nation, made by means of armed force, even though lawful as an exercise of the executive power of the society of nations, gives of itself to the constabulary nation no right to territory or property of the nation policed; but a transfer of the territory of the nation thus policed, or an indemnity, may be awarded to the constabulary nation by the concert of the nations or by the concert of the interested nations, of such extent or amount as may be proper, considering its expenditure or loss and all other circumstances.

It will be noticed that in the above statement of the fundamental principles of the law of the society of nations, there is a wide departure from the various *Codes de la Paix* with which the pacifist literature abounds; in that the application by a nation of armed force outside its limits is not considered as in all cases unjustifiable and illegal. Such principles are undoubtedly inconsistent with immediate disarmament, but they are, it may be confidently asserted, the only principles likely to bring about a general condition of peace. The recognition of the society of nations as an existing fact gives a basis for distinguishing between those applications of armed force by nations which are and ought to be lawful as exercises of the executive power of the society of nations,

and those which are and ought to be unlawful as acts of robbery or oppression. Any application of armed force by a nation against another which tends to support at the same time the nations and the society of nations is and of right ought to be lawful, and armed force directed by a nation so as to produce the contrary effect is and ought to be unlawful. Being thus able to distinguish between constabulary action and war, it remains only to educate public sentiment so that more and more the application of armed force by the nations shall in fact be constabulary action in the name of the executive power of the society of nations. As the area of constabulary action increases, the area of war necessarily diminishes. As the peoples and nations of the world become more and more habituated to the notion of the application of armed force by the nations for the constabulary purposes of the whole society, separate nations will gradually become anxious to rid themselves of this constabulary burden and will be ready to unite in forming some plan for delegating their constabulary responsibilities. When this occurs, war will be abolished in the society of nations by exactly the same process that individual fighting and private war have been abolished in the separate nations—that is, by political organization. The crude constitution-making, legislative, executive and judicial institutions and processes which now exist in the society of nations will gradually be improved upon and rendered more definite and efficient, and some kind of arrangement will ultimately be made which will minimize the burden of constabulary action and preserve the general peace and order.

From what has been said, it may, it would seem, be concluded that international law in its literal and technical sense as law between or among nations is destined gradually to pass into the oblivion which awaits outworn sciences and philosophies, both because such a law is inherently impossible as a matter of jurisprudence, and because it cannot be squared with the principles of political science. If the name international law is retained, therefore, it must be given an enlarged meaning, so that it shall in fact mean the law of the society of nations. Such a meaning has already been attempted to be attached to it by many writers, and from the time of Grotius the society of nations has been recognized by publicists in a figurative sense. What is now needed is, that publicists should accept the society of nations not in a figurative

but in a literal sense, as an existing and permanent fact of practical politics — as a political organization having a concrete existence just as really as has the United States or as has Great Britain. Until recently, the facts of international life have made men in practical politics hesitate to accept this fact and have compelled them to adopt compromise notions. Violent insistence upon national sovereignty has required equally violent assertions of national sovereignty in return. The situation has now changed, and almost without our notice the facts of international life have become such that the conception of a society of nations and of a law of this society has become more reasonable as a working basis of action than the conception of the nations as wholly sovereign and wholly independent, living under agreements with each other which they choose to regard as law.

No doubt for a long time to come there will be few principles of the law of the society of nations which will be so definitely formulated and established that any national court would think of applying them in superiority to a treaty or a national law with which they should conflict. As international tribunals increase, however, the question of the effect which should be given to principles of the law of nations as controlling and superseding treaties and national laws inconsistent with these principles will become a pressing one. If the Court of Arbitral Justice is established at The Hague, it will be essential to its success that the principles of the law of the society of nations should, within the sphere suitable for that law, control and supersede all conflicting treaties and national laws. That court already exists in principle by the action of the Second Hague Conference. It wants only the appointment of the judges. Once established, it will be a court of the society of nations. If it gives effect to all treaties and all national laws which bear on the cases brought before it, without ascertaining whether or not they conflict with the organic, statutory or customary law of the society of nations, it will abdicate its high function and become merely a part of the diplomatic machinery of the disputing nations. Thus in a very concrete sense, the idea that a society of nations exists and that it has formulated and is formulating a federal law which within the sphere of the common interests is superior to treaties between the nations and superior to the municipal law of each nation, is of service at

the present time; for on the acceptance of this idea depends the establishment of the Court of Arbitral Justice at The Hague.

But even if we leave out of consideration the proposed new court at The Hague, and look solely at the general benefit to be derived from the prevalence of this idea, we may find good reasons for accepting it. It is to be noticed that the society of nations has no human superior, and that it exists not by any external recognition, but by the mental and psychological action of the individuals who compose it. No formal federation of the nations is necessary. It is only necessary for the peoples and nations of the world to recognize themselves as forming one organized political society. Each individual and nation is as important as any other in exercising the power of recognition, and each individual or nation is equally entitled to participate in the work of improving the organization of the society to which he belongs. Historians have noted that the beginning of the real progress of a nation occurs when its people realize their existence as a nation, and come to understand that the nation in the hands of the people can be made one of the greatest means for extending the power of the individual and enabling him to increase his own happiness. Out of such a popular conception of the nation and of the possibilities of individual good to be derived from an economical and efficient national organization, has developed the whole system of democratic representative and responsible government, whereby each person capable of intelligent judgment is enabled to participate, in an orderly and appropriate manner, in the direction of each political organization of which he is a member. On such ideas is based the present progressive movement, which is extending throughout the world. That movement is, in each nation, a conscious effort of individuals, parties and corporations to invent improvements in existing political organization, so that town, city, state and nation may in their respective spheres operate more economically and efficiently in extending the powers of the individual and enabling him to increase his happiness. A similar consciousness, shared by all the peoples of the world, of the existence of the society of nations as the one permanent and all-inclusive nation, and a similar appreciation by them of the possibilities of human betterment through improvements in the organization and working of this great society, must, it would seem, necessarily result in

broadening the progressive movement, and lead to a conscious and persistent effort of individuals, parties and corporations in all parts of the world, directed toward improvements in the organization of this great nation, to the end that it, too, may be made more efficient in extending the powers of the individual and enabling him to increase his happiness. As such conscious efforts applied within each nation by its citizens have always resulted in a notable increase in the prevalence of justice, order and peace among the individuals forming the nation; so similar efforts by citizens of the society of nations may ultimately result in a prevalence of justice, order and peace among the scattered and diverse peoples and nations which together form the society of nations, in some degree approaching that which each nation now enjoys within its own borders.

Lest what has been said may be thought to furnish some support for those who seek the immediate federation of the world under a "parliament of man" enacting a "world-law," let it be said that there is nothing in the foregoing which is intended to give support to any such idea. The form which the organization of the society of nations will take, and the changes in the constitution-making, legislative, executive and judicial processes of the society which will occur, as the result of progressive improvement, it is impossible to foretell. It may well be that the ultimate form will be quite different from anything yet known, and one which would be unimaginable at the present time.

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